

**STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

<b>IN THE MATTER OF:</b>	)	<b>DIVISION OF WATER</b>
	)	<b>POLLUTION CONTROL</b>
<b>BURRUS RIDGE GOLF</b>	)	
<b>COMMUNITY, LLC and SUMMIT</b>	)	
<b>CONSTRUCTORS, INC. and MID-</b>	)	
<b>TN EROSION AND SEDIMENT</b>	)	
<b>CONTROL, INC.</b>	)	
	)	
<b>RESPONDENTS</b>	)	<b>CASE NO. WPC07-0158</b>

**DIRECTOR'S ORDER AND ASSESSMENT**

NOW COMES Paul E. Davis, Director of the Tennessee Division of Water Pollution Control, and states:

**PARTIES**

**I.**

Paul E. Davis is the duly appointed Director of the Tennessee Division of Water Pollution Control (hereinafter the "director" and the "division" respectively) by the Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "commissioner" and the "department" respectively).

**II.**

Burrus Ridge Golf Community, LLC (hereinafter "Respondent Burrus") is the owner and a developer of the Bear Creek at Burrus Ridge development project, located south of Webster Road, east of New Hall Road near the town of Oakdale in Robertson County, Tennessee (hereinafter the "site"). Service of process may be made on

Respondent Burrus through its registered agent, Leslie B. Wilkinson Jr., at 315 Deaderick Street, Suite 1800, Nashville, Tennessee 37238.

### **III.**

Summit Constructors, Inc. (hereinafter “Respondent Summit”) is registered to conduct business in the State of Tennessee, and is a contractor for the site. Service of process may be made on Respondent Summit through its registered agent, Laurence M. Papel, at 211 Commerce Street, Suite 1000, Nashville, Tennessee 37201.

### **IV.**

Mid-TN Erosion and Sediment Control, Inc. (hereinafter “Respondent Mid-TN”) is registered to conduct business in the State of Tennessee, and is a contractor at the site. Service of process may be made on Respondent Mid-TN through its registered agent, Chris Richey, at 8235 Neal Road, Arrington, Tennessee 37014.

## **JURISDICTION**

### **V.**

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess

damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the “Rule”). Pursuant to T.C.A. §69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

## VI.

The Respondents are “persons” as defined at T.C.A. §69-3-103(20) and, as hereinafter stated, the Respondents have violated the Act.

## VII.

The unnamed tributaries to Sulphur Fork Creek are referred to herein as “waters of the state” as defined in T.C.A. §69-3-103(33). Pursuant to T.C.A. §69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, “Use Classifications For Surface Waters,” is contained in the *Official Compilation of Rules and Regulations for the State of Tennessee*. Accordingly, the unnamed tributaries to Sulphur Creek have been classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife.

### **VIII.**

T.C.A. §69-3-108 requires a person to obtain a permit from the department prior to the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state. Pursuant to T.C.A. §69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a §401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

### **IX.**

T.C.A. §69-3-108 requires a person to obtain coverage under a permit prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substances will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the “TNCGP”) may be obtained by submittal of a Notice of Intent (NOI), Storm Water Pollution Prevention Plan (SWPPP), and associated fee.

## **FACTS**

### **X.**

On January 30, 2006, the division received a NOI, SWPPP, and associated fee from the Respondents to obtain coverage under the TNCGP for the construction of town homes and residential lots associated with Phase 1, Sections 1 and 2, of the site.

### **XI.**

On January 31, 2006, the division received an ARAP application from Respondent Burrus seeking coverage under the General ARAP for Utility Line Crossings, for the installation of one utility line. The ARAP application also sought coverage under the General ARAP for the Construction and Removal of Minor Road Crossings for the construction of two road crossings at the site.

### **XI.**

On February 27, 2006, the division issued Notices of Coverage (NOCs) to the Respondents authorizing the proposed activities under the TNCGP, the General ARAP for the Construction and Removal of Minor Road Crossings, and the General ARAP for Utility Line Crossings. Coverage under these permits became effective on this date.

### **XII.**

On November 27, 2006, the division received a complaint regarding a pond that had been constructed in a stream at the site, and that mud had entered the stream.

### **XIII.**

On December 1, 2006, division personnel conducted a site investigation regarding the complaint, and observed that alterations had been made to an existing impoundment located in an unnamed tributary to Sulphur Fork Creek. Division personnel also observed that EPSC measures at the site were not functioning properly and not being maintained allowing sediment to enter an unnamed tributary to Sulphur Fork Creek causing a condition of pollution. Additionally, it was observed that 14 road crossings, used as golf cart paths, had been constructed in the unnamed tributaries to Sulphur Fork Creek throughout the site. Upon further investigation it was determined that separate road crossings and one utility line crossing had been authorized under an ARAP permit.

### **XIV.**

On December 15, 2006, the division issued a Notice of Violation (NOV) to the Respondents for the violations observed during the December 1, 2006, site investigation. The NOV instructed the Respondents to immediately perform maintenance activities on existing EPSC measures, stabilize disturbed areas, and implement additional EPSCs where necessary to prevent sediment from entering streams on site. Additionally, the NOV notified Respondent Summit and Respondent Burrus that in order to address the sediment deposition in the stream, a complete ARAP application should be submitted no later than 15 days after receipt of the NOV, to obtain coverage under the General ARAPs for Sediment Removal for Stream Remediation and Stream Restoration and Habitat Enhancement. Further, the NOV notified Respondent Burrus that the additional road crossings observed on site had not been authorized under an ARAP.

## **XV.**

On January 9, 2007, the division received correspondence from Respondent Burrus regarding the December 15, 2006, NOV. The correspondence stated that the existing impoundment on site had been altered to decrease the slope of the impoundment and to install an emergency drain. The correspondence also notified the division that Respondent Mid-TN had been hired to maintain the site during construction. Additionally, on this date, the division received an unsigned ARAP application seeking coverage under the General ARAPs for Sediment Removal for Stream Remediation and Stream Restoration and Habitat Enhancement.

## **XVI.**

On March 1, 2007, the division conducted a follow-up inspection at the site and observed that EPSC measures had not been implemented in portions of the site. Hillsides where work had temporarily or permanently ceased remained bare with no EPSC measures implemented allowing sediment to migrate down gradient and enter the stream. Additionally, the site SWPPP had not been updated to indicate where EPSC measures had been replaced, modified, or repaired.

## **XVII.**

On March 21, 2007, the division issued a second NOV to the Respondents regarding the violations observed during the March 1, 2007, site investigation. The NOV further notified the Respondents that the division had received an unsigned ARAP application for the General ARAPs for Sediment Removal for Stream Remediation and

Stream Restoration and Habitat Enhancement, and understood that all in-stream sediment removal activities would be conducted by hand. The division also notified the Respondents that when the division receives a signed copy of the ARAP application and a cover letter stating all in-stream work would be done by hand, the division would authorize coverage under the general ARAP permits.

### **XVIII.**

On May 30, 2007, division personnel conducted a site investigation and observed that EPSC measures implemented at the site were not being maintained, and some portions of the site remained bare with no EPSC measures implemented. Further, the site SWPPP had not been updated to reflect replacement, modification, or repair of EPSC measures at the site.

Division personnel also observed that burnt vegetation material had been pushed into the streambed of an unnamed tributary to Sulphur Fork Creek, resulting in a condition of pollution. Also, machine tracks were observed in the stream, indicating machinery had operated in the stream channel.

### **XIX.**

On June 13, 2007, the division issued a third NOV to the Respondents regarding the violations observed during the May 30, 2007, site investigation.



## **XX.**

On July 2, 10, 17, and 24, 2007, Respondent Burrus notified the division, via email, that additional EPSC measures had been installed consisting of check dams and berms, and that maintenance activities were on-going.

## **VIOLATIONS**

## **XXI.**

By physically altering waters of the state without authorization under an ARAP, and by violating the terms and conditions of the TNCGP, the Respondents have violated T.C.A. §§69-3-108(a) and (b) and 69-3-114(b), which state:

T.C.A. §69-3-108:

- (a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.
- (b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:
  - (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
  - (2) The construction, installation, modification, or operation of any treatment works, or part thereof, or any extension or addition thereto;
  - (3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;
  - (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;

- (5) The construction or use of any new outlet for the discharge of any wastes into the waters of the state;
- (6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

T.C.A. §69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in §69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the commissioner under this part.

## **XXII.**

By discharging sediment into waters of the state that resulted in a condition of pollution, the Respondents have violated T.C.A. §§69-3-114(a), as referenced below, and 69-3-114(b), as referenced above.

T.C.A. §69-3-114(a):

It shall be unlawful for any person to discharge any substance into waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

## **ORDER AND ASSESSMENT**

### **XXIII.**

WHEREFORE, pursuant to the authority vested by T.C.A. §§69-3-107, 69-3-109, 69-3-115, and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER and ASSESSMENT to the Respondents:

1. The Respondents shall, within FOURTEEN (14) DAYS of receipt of this Order, implement appropriate EPSC measures designed by a professional engineer or other qualified professional to assure that no material leaves the site and enters waters of the state and provide written notification of completion to the manager of the division's Nashville Environmental Field Office (NEFO) located at 711 R.S. Gass Boulevard, Nashville, Tennessee 37243.
2. The Respondents shall maintain appropriate EPSC measures designed by a professional engineer or other qualified professional to assure that no material leaves the site and enters waters of the state. These professionally designed controls shall be maintained until project completion.
3. The Respondents shall, within THIRTY (30) DAYS of receipt of this Order, submit for division approval a corrective action plan (CAP) for the restoration of the impacted segments of the unnamed tributaries to Sulphur Fork Creek. The CAP shall include, but not be limited to, techniques and activities to be utilized during sediment removal and restoration activities, EPSC measures to be implemented during sediment removal and restoration activities, and a time schedule for the proposed activities. Be advised that in-stream sediment

removal activities should be conducted with hand tools in an attempt to minimize additional disturbance. The plan shall be submitted to the manager of the division's Nashville Environmental Field Office (NEFO) located at the address referenced in Item 1 above.

4. The Respondents shall, within THIRTY (30) DAYS of division approval, complete the activities outlined in the approved corrective action plan and notify the manager of the division's NEFO upon completion.
5. The Respondents are hereby assessed a CIVIL PENALTY in the amount of FORTY-TWO THOUSAND SIX HUNDRED DOLLARS (\$41,600.00).
  - a. The Respondents shall pay TEN THOUSAND SIX HUNDRED DOLLARS (\$10,600.00) to the division within THIRTY (30) DAYS of receipt of this Order.
  - b. The Respondents shall pay EIGHT THOUSAND DOLLARS (\$8,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondents fail to comply with Item 1 above in a timely manner.
  - c. The Respondents shall pay EIGHT THOUSAND DOLLARS (\$8,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondents fail to comply with Item 2 above in a timely manner.
  - d. The Respondents shall pay FOUR THOUSAND DOLLARS (\$4,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondents fail to comply with Item 3 above in a timely manner.
  - e. The Respondents shall pay ELEVEN THOUSAND DOLLARS (\$11,000.00) to the division within THIRTY (30) DAYS of default, if, and

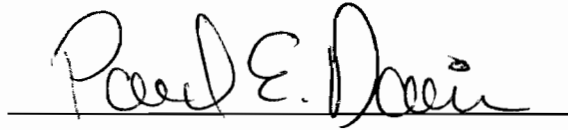
only if, the Respondents fail to comply with Item 4 above in a timely manner.

6. The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

Further, the Respondents are advised that the foregoing Order is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondents in the future. The director may, for good cause shown by the Respondents, extend for a fixed time period, the compliance dates contained within this Order.

To be eligible for this time extension, the Respondents shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay. The director will reply to the Respondent's request in writing. Should the Respondent fail to meet the requirement by the extended date, any associated CIVIL PENALTY shall become due THIRTY (30) DAYS thereafter.

Issued by the Director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 21<sup>st</sup> day of AUGUST, 2007.

A handwritten signature in black ink, appearing to read "Paul E. Davis", is written over a horizontal line.

Paul E. Davis, P.E.

Director, Division of Water Pollution Control

### **NOTICE OF RIGHTS**

T.C.A. §§69-3-109 and 69-3-115, allow the Respondents to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondents must file with the Office of General Counsel, located at 401 Church Street, L&C Tower 20<sup>th</sup> Floor, Nashville, Tennessee 37243, a written petition setting forth each Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within THIRTY (30) DAYS of receiving this Order and Assessment.

If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. §4-5-301

*et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payments of the civil penalty shall be made payable to the "Treasurer, State of Tennessee," and sent to the Division of Fiscal Services-Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14<sup>th</sup> Floor L&C Tower, 401 Church Street, Nashville, Tennessee 37243. All other correspondence regarding this matter should be sent to Paul E. Davis, Director, Division of Water Pollution and Control, at the address above. Please write your case number on all payments and all correspondence concerning this matter.